IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. ————.

RAYMOND J. GRACE, Trading under the name and style of R. J. & M. C. Grace, *Petitioner*,

v.

M. HAMPTON MAGRUDER, Collector of Internal Revenue, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINION OF COURT BELOW.

The opinion of the United States Court of Appeals for the District of Columbia is in the record at pages 68-71.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925, Title 28 U. S. C., Section 347.

Final judgment was entered in the United States Court of Appeals for the District of Columbia on March 19, 1945.

STATUTES AND REGULATIONS INVOLVED.

Chapter 9, Subchapter A, Internal Revenue Code; 53 Stat. 175, as amended August 10, 1939, c. 666, Title VI Sec. 601; 53 Stat. 1381; 26 USCA Sec. 1400-1401-1410-1426-1429;

Chapter 9, Subchapter C, Internal Revenue Code, 53 Stat. 183 as amended August 10, 1939, c. 666, Title VI Sec. 608, 53 Stat. 1387; 26 USCA Sec. 1600, 1607, 1609;

Regulations 90 Bureau of Internal Revenue relating to excise tax on employer under Title IX of the Social Security Act, Article 205; C. F. R. Title 26, Sec. 403 et seq.;

Regulations 91 of the Bureau of Internal Revenue relating to employees tax and employers tax under Title VIII of the Social Security Act, Articles 2, 3, and 4; C. F. R. Title 26, Sec. 402 et seq.

(Applicable portions set out in Appendix.)

QUESTIONS PRESENTED.

The question presented is whether or not coal hustlers who store coal for the consumer at the point of delivery and who are paid 75¢ per ton for carrying in and storing the coal are employees of the petitioner coal dealer within the purview of the Social Security Act and whether or not the storage charges collected from the customer by the dealer and paid to the hustler constitutes the payment of wages within the meaning of said Act.

STATEMENT OF CASE.

The facts are sufficiently stated in the petition for certiorari.

SPECIFICATION OF ASSIGNED ERRORS INTENDED TO BE USED.

The petitioner contends that the Court below erred in holding that coal hustlers were employees of the petitioner within the purview of the Social Security Act and that storage charges collected by the petitioner from the consumer and transmitted to the hustler constituted the payment of wages within the provisions of said Act.

SUMMARY OF ARGUMENT.

The Court below followed the case of *United States* v. *Vogue, Inc.*, 145 Fed. (2) 609, decided by the Circuit Court of Appeals, 4th Circuit, on November 14, 1944. The facts in that case were wholly unlike the facts in this case. The workers held by the Court to be employees were employed in a department store to make alterations upon garments sold by the employer at certain charges for alterations, which were collected by the employer and a percentage thereof paid to the workers weekly whether collected by the employer or not. For a time the workers were on a salary basis. They did their work within the establishment of the employer and were obviously subject to the control of the employer in performance of their work. The Court in that case held:

> "We think it perfectly clear that Mrs. Fulton and Mrs. Woodfin were not independent contractors, but *employees within any fair meaning of that term* and certainly within the meaning of the Social Security Act." (Italics supplied.)

The Court also cited the Regulations of the Commissioner of Internal Revenue and brought the employees within their terms.

The case of *Glenn* v. *Beard*, 141 Fed. (2) 376, decided by the Circuit Court of Appeals, 6th Circuit, on March 20, 1944, is directly in conflict with the opinion in the *Vogue* case, and supports petitioner's case. The class of workers in that case were women doing needlework in their homes on a job basis, the Court holding these workers not to be employees within the meaning of the Social Security Act. The facts in the *Beard* case are not identical with the facts in the present case, nevertheless it is submitted that that case gives the correct expression of the law.

The question presented is of importance and the conflict should be settled by this Court.

The Commissioner of Internal Revenue pursuant to authority of the Act adopted certain Regulations for the interpretation and administration of the act (App. 18-20). A

reading of the facts relating to the relationship between the petitioner and coal hustlers (R. 58-60) clearly demonstrates that these men do not fall within the language of the statute or the Regulations. The Regulations have the force and effect of law. They are construed in the light of the facts in both of the cases referred to above.

The petitioner did not have the right of control over these men required by the Regulations to constitute them employees. The lower court in its opinion stated respecting the reservation of power of control:

> "Nothing could be more effective to this end than the simple expedient of requiring that (1) he finish the job assigned, (2) get the signature of a satisfied customer, (3) return dutifully to appellant's office, (4) present the signed card and get his money." (R. 71)

The facts found by the Court, however, contain the following:

> "The men in the yard are not required to take any job offered and may, and sometimes do, refuse particular jobs. * * * Sometimes after accepting a job a man will refuse to do the job of storing if upon examination the job appears unusually hard. * * * (R. 58-59)
>
> When a coal hustler refuses to store coal at the home of the customer, plaintiff usually sends another man. (R. 60).

The Court's reference numbered 1 appears contrary to said facts; numbers 2, 3 and 4 constitute merely the furnishing of evidence by the hustler that the coal has been stored to enable him to get his money, and is not evidence of right of control of the petitioner in the performance of the work by the men.

The Regulations provide:

> "However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. * * *
> "Generally the relationship exists when the person for whom services are performed has the right to control

and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done." (App. 18)

The facts found by the trial court clearly show that these coal hustlers were not subject to the required control. The workers involved here not falling within the Regulations of the Commissioner, the position taken by the respondent is contrary to the Department's own Regulations.

The lower court in its opinion (R. 42) held coal hustlers to be employees under a liberal construction of the law. However, with what elasticity may a liberal construction be applied? Certainly, under a liberal construction of the law workers not falling within the obvious terms of the Statute and Regulations should not be held to be covered thereby, even under a liberal view of the same.

The lower court in its opinion cited the *Vogue* case in which reference was made to the decision of this Court holding newsboys to be employees within the meaning of the National Labor Relations Act. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 64 S. Ct. 851. However, that Act is more broad in its coverage than the Social Security Act, and should not be authority for the lower Court in this case.

Congress specifically exempted a large field of workers from the provisions of the Social Security Act including domestic labor, agricultural labor, casual labor not in the course of the employer's trade or business and other types of employment (Act Section 1426 b-h). These exemptions from the operation of the Act clearly show the purpose of Congress in not intending that all workers be embraced within the provisions of the Act. Those exempted clearly are employees. Therefore, it cannot be said that Congress, specifically excluding certain types of actual employees, intended that the Social Security Act cover the type of work-

ers involved here who are paid by the job for doing work where the petitioner had no right to compel them to take a particular job, and in which no control or the right of control over the performance of the work is retained by the supposed employer, and where the men often refuse to do specific jobs because not to their liking.

The practical effect of this decision on coal dealers will be that out of each storage payment of 75¢ or such sum as the hustlers will receive, the dealer will have to, under the law, deduct 1 per cent as the so-called employee's share. In many cases the hustlers collect direct from the consumer and in those cases it would be impossible for the dealer to receive the employee's share. These hustlers are mostly irresponsible persons and are not interested in having taxes taken out of their compensation. While the question of withholding tax is not involved in this case and the decision does not necessarily mean that these men are employees for all purposes, should they be deemed to be employees under that Act the dealer might also be required to withhold a certain percentage from each storage payment. This would result in difficulty in securing men to do work at the prevailing rate as the prime interest of these men is the amount they actually receive for the work. In situations of this sort where the men performing the work receive pay by the job at a small rate, a vast amount of bookkeeping and record keeping would necessarily be entailed and the difficulty of properly collecting and reporting the amount due the Government is readily seen.

CONCLUSION.

It is therefore respectfully submitted that this petition for a writ of certiorari should be granted.

RAYMOND J. GRACE, trading under the name and style of R. J. & M. C. Grace.

By LOWRY N. COE,
Attorney for Petitioner.

APPENDIX OF STATUTES AND REGULATIONS INVOLVED.

INTERNAL REVENUE CODE—CHAPTER 9

SUBCHAPTER A—EMPLOYMENT BY OTHERS THAN CARRIERS

(Federal Insurance Contributions Act)

Part I—Tax on Employees

26 U. S. C. A.

SEC. 1400 RATE OF TAX.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 1426 (a)) received by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages received during the calendar years 1939, 1940, 1941, 1942, 1943, and 1944, the rate shall be 1 per centum.

(2) With respect to wages received during the calendar year 1945, the rate shall be 2 per centum. * * *

SEC. 1401. DEDUCTION OF TAX FROM WAGES.

(a) REQUIREMENT.—The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

Part II—Tax on Employers

SEC. 1410. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages paid during the calendar years 1939, 1940, 1941, 1942, 1943, and 1944, the rate shall be 1 per centum. * * *

SEC. 1426. DEFINITIONS.

When used in this subchapter—

(Sec. 1426 (a))

(a) WAGES.—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—(exceptions not applicable) * * *

(Sec. 1426 (b))

(b) EMPLOYMENT.—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except * * *

SEC. 1429. RULES AND REGULATIONS.

The Secretary shall make and publish such rules and regulations, not inconsistent with this subchapter, as may be necessary to the efficient administration of the functions with which he is charged under this subchapter. The Commissioner, with the approval of the Secretary, shall make and publish rules and regulations for the enforcement of this subchapter.

SUBCHAPTER C—TAX ON EMPLOYERS OF EIGHT OR MORE

("Federal Unemployment Tax Act")

26 U. S. C. A.

SEC. 1600. RATE OF TAX.

Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year

thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607 (b)) paid by him during the calendar year with respect to employment (as defined in section 1607 (c)) after December 31, 1938.

SEC. 1607. DEFINITIONS.

When used in this subchapter—

(Sec. 1607 (a))

(a) EMPLOYER.—The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more.

(Sec. 1607 (b))

(b) WAGES.—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—(exceptions not applicable) • • •

(Sec. 1607 (c))

(c) EMPLOYMENT.—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—(exceptions not applicable) • • •

SEC. 1609. RULES AND REGULATIONS.

The Secretary and the Social Security Board, respectively, shall make and publish such rules and regulations, not inconsistent with this subchapter, as may be necessary to the efficient administration of the functions with which each is charged under this subchapter. The Commissioner, with the approval of the Secretary, shall make and publish

rules and regulations for the enforcement of this subchapter, except sections 1602 and 1603.

REGULATIONS.

REGULATIONS 90 BUREAU OF INTERNAL REVENUE RELATING TO EXCISE TAX ON EMPLOYER UNDER TITLE IX OF THE SOCIAL SECURITY ACT, ARTICLE 205, C. F. R. TITLE 26, SEC. 403 ET SEQ.:

"EMPLOYED INDIVIDUALS.—An individual is in the employ of another within the meaning of the Act if he performs services in an employment as defined in section 907(c). However, the relationship between the individual who performs such services and the person for whom such services are rendered must, as to those services, be the legal relationship of employer and employee. The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the act.

The words 'employ', 'employer', and 'employee', as used in this article, are to be taken in their ordinary meaning. * * *

Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee. * * *

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Individuals performing services as independent contractors are not employees. Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession in which they offer their services to the public, are independent contractors and not employees. * * *"

REGULATIONS 91 OF THE BUREAU OF INTERNAL REVENUE RELATING TO EMPLOYEES TAX AND EMPLOYERS TAX UNDER TITLE VIII OF THE SOCIAL SECURITY ACT, ARTICLES 2, 3, AND 4; C. F. R. TITLE 26, SEC. 402 ET SEQ.

"ART. 2. EMPLOYMENT.—* * * To constitute an employment the legal relationship of employer and employee must exist between the person for whom the services are performed and the individual who performs them, and the services involved must be performed within the United States, that is, within any of the several States, the District of Columbia, or the Territory of Alaska or Hawaii. (See articles 3 and 4 as to who are employees and employers, respectively, and articles 5 to 13, inclusive, relating to excepted services.) * * *

ART. 3. WHO ARE EMPLOYEES.—Every individual is an employee within the meaning of Title VIII of the Act if he performs services in an employment as defined in section 811 (b) (see article 2).

However, the relationship between the person for whom such services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee. Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection it is not necessary that the employer actually direct or control the manner in which the services

are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

* * * * * * * * * *

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists."